Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OREGON ARENA CORPORATION AND MICHAEL FENNELL,
Petitioners.

v.

DANIEL LEE, MICHAEL CARR, EDWARD GATHRIGHT AND JEREMY SONNIER,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in conflict with other circuits that have considered the issue, that a private party who regulates speech activities on its premises becomes a state actor under this court's "public function test" thereby subject to liability for civil rights claims under 42 U.S.C. § 1983.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. Oregon Arena Corporation, an Oregon corporation; defendant-appellee;
2. Michael Fennell, an individual; defendant-appellee;
3. Daniel Lee; plaintiff-appellant;
4. Michael Carr; plaintiff-appellant;
5. Edward Gathright; plaintiff-appellant;
6. Jeremy Sonnier; plaintiff-appellant.

Petitioner Oregon Arena Corporation is not publicly traded, nor is it a subsidiary or affiliate that has issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Oregon Arena Corporation and Michael Fennell respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-12a) is reported at 276 F.3d 550 (9th Cir. 2002). The district court's opinion (App., 13a-36a,) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 2002. App. *infra*, 1a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves a claim alleging state action under 42 U.S.C. § 1983, for violation of plaintiffs' First and Fourteenth Amendment rights.

STATEMENT OF THE CASE

Plaintiffs are self-proclaimed street preachers who sued defendants Oregon Arena Corporation, ("Oregon Arena"), and Michael Fennell (the corporation's general counsel) for alleged First Amendment violations in connection with their preaching activities. App., *infra*, 15a. Oregon Arena operates a recreational venue called the "Rose Quarter Commons" which includes restaurants, a concert hall, parking garages, and a sports stadium, which primarily serves as the home stadium for the Portland Trail Blazers professional basketball team. App., *infra*, 17a-18a. Oregon Arena is a private, for-profit business. App., *infra*, 17a. The City owns portions of the real property referred to as the Rose Quarter Commons. App., *infra*, 18a. The Commons is an open-air plaza area surrounding the Rose Garden Arena, Memorial Coliseum, One Center Court and the Garden Garage. App., *infra*, 18a. Oregon Arena owns the Rose Garden Arena, One Center Court and the Garden Garage. App., *infra*, 18a.

The City leased the property to Oregon Arena from January 1993 through June 1997. App., *infra*, 18a. The lease required Oregon Arena to permit access to the Commons for free speech as may be required by law. App., *infra*, 18a. The lease expired, and was not renewed, but Oregon Arena continues to operate the Rose Quarter Commons, renting out portions of it for both private and public events. App., *infra*, 18a.

Pursuant to the lease agreement, general counsel Michael Fennell drafted a "Code of Conduct" and a set of rules titled the "Petitioning and Free Speech Rules." App., *infra*, 18a. The Code prohibits anyone from "yelling or screaming with

the intention of disturbing persons or disturbing lawful assembly" and designates certain areas, available on a first-come-first-served basis, for petitioning and speech activities. App., *infra*, 18a. The Code and the Rules also limit activities to times when the Rose Garden—the sports arena—is open to the public and sets forth other limitations in order to ensure unobstructed crowd control and traffic flow. App., *infra*, 19a.

In-house security officers and a private security agency enforce the Code and Rules. App., *infra*, 19a. Both are instructed by Oregon Arena to enforce the Code and Rules impartially. Over the years, a number of individuals and interest groups have used the designated areas without incident. App., *infra*, 19a. On several occasions, however, patrons at the Commons have been offended by plaintiffs' activities, resulting in potentially violent confrontations between the two. App., *infra*, 19a. Within the year before this suit was filed, plaintiffs had numerous run-ins with Oregon Arena's security officers involving enforcement of the Code and Rules. App., *infra*, 20a.[1]

Plaintiffs brought a claim for injunctive relief and damages against Oregon Arena under 42 U.S.C. § 1983. Plaintiffs alleged that defendant was a state actor under the "public function" test, because by policing the Rose Quarter Commons, Oregon Arena performs a public function in deciding who can use the property. App., *infra*, 29a.

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[1] On several occasions, women attending events at the Rose Garden or Memorial Coliseum complained that plaintiffs called them "whores," "sluts," "prostitutes," "daughters of Babylon" and "Jezebels," and told the women that they "were going to hell." App., *infra*, 21a. Another encounter with the private security force involved complaints from a woman and her daughter after plaintiff Gathright along with another man called the daughter a "whore" because she was wearing shorts and a halter top. The mother shouted at the men and grabbed one of their notebooks; security removed the most verbal man at that point from the scene. App., *infra*, 23a.

The district court held that Oregon Arena was not a state actor under the "public function" test, because plaintiffs failed to show that the City was sufficiently "entwined" with the management or control of the property so as to make Oregon Arena a state actor under *Evans v. Newton*, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). App., *infra*, 30a. The court relied on the Seventh Circuit decision in *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996), *cert. denied*, 519 U.S. 935 (1996), in holding that use of private security force on public property does not transform a private corporation into a state actor. App., *infra*, 32a.

The Ninth Circuit reversed. Relying on a 1990 district court case from the District of Massachusetts, *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace,* Inc., 745 F. Supp. 65 (D. Mass. 1990), the court held that Oregon Arena's regulation of free speech at the Commons was a public function. App., *infra*, 8a. In the *Citizens* case, the court found state action because the public had an easement over the land operated by the private corporation. App., *infra*, 8a.

REASONS FOR GRANTING THE WRIT

This case presents the court with an opportunity to resolve what is now a conflict in the circuits: i.e., when, if ever, the regulation of speech activities transforms the regulator into a state actor subject to liability under 42 U.S.C. § 1983. Prior to the decision in this case, the use of a private security force to regulate conduct on privately controlled, but government owned property, had not resulted in a finding of state action.

The court's decision is in conflict with the decisions of other circuits, and potentially turns any private entity who regulates speech activities on its property into a governmental actor subject liability for civil rights violations. Private entities have long been able to regulate conduct on private property without being subject to claims of First Amendment

violations. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976). Further review is warranted.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OTHER CIRCUITS' ANALYSIS OF STATE ACTION UNDER THE "PUBLIC FUNCTION TEST."

In *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996), the Seventh Circuit rejected the argument that a private security guard became a state actor under the "public function" test merely because the guard was employed to police a public housing project. *Id.* at 905. Similarly, the Tenth Circuit, in *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995), held that a company which leased a government-owned facility and provided security during the event did not perform a public function such that it became a state actor under 42 U.S.C. § 1983. *Id.* at 1456. In *National Broadcasting Co. v. Communications Workers of America*, 860 F.2d 1022 (11th Cir. 1988), the court held that a union which excluded a broadcasting company from a meeting held in a municipally owned facility was not a state actor under the public function test, because the activities of selecting media stations, or leasing space to conduct meetings has never been exclusive functions of the state. *Id.* at 1026.

Each of these decisions followed this court's earlier rulings on what constitutes a public function and when a private party necessarily becomes a state actor. If the state delegates a function that is traditionally and exclusively reserved to the State, then the private party becomes a state actor. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). This court's decisions make it clear that this is a difficult test to satisfy. Many functions have traditionally been performed by governments, but very

few have been "exclusively reserved to the State." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). As this court stated in *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982):

> "Our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been a traditionally *exclusive* prerogative of the State." *Id.* at 841.

This court has found some functions that satisfy this test—the administration of elections of public officials, *Terry v. Adams*, 345 U.S. 461, 468, 97 L. Ed. 2d 1152, 73 S. Ct. 809 (1953); management of a city park, *Evans v. Newton*, 382 U.S. 296, 298, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966); and management of a company town, *Marsh v. Alabama*, 326 U.S. 501, 505, 90 L. Ed. 2d 265, 66 S. Ct. 276 (1946). The regulation of speech activities has never been held an *exclusive* public function, and private action taken on public property has also never been held to be an *exclusive* public function as required by that test. As discussed above, the other circuits that have addressed the issue have consistently found that private security enforcement on public property does not result in state action.

The Ninth Circuit's decision is at odds with the decisions of the other circuits and expands the narrowly written "public function test" beyond parameters previously established by this court about what functions are truly exclusively reserved to the government.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Ninth Circuit held that Oregon Arena was a state actor under the "public function" test. *Evans v. Newton*, 382 U.S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). Under this

test, private individuals become agencies or instruments of the State, subject to its constitutional limitations if they are endowed by the State with governmental functions. The function at issue, however, must be both traditionally and exclusively governmental in nature. *Rendall-Baker, supra*, 457 U.S. at 842.

Evans involved a challenge to racial segregation in a city park. The City of Macon had equitable title to the park, as trustees. In attempting to fulfill the grantor's segregation wishes, the city resigned as trustee, and transferred equitable title of the park to a "private" Board of Directors to circumvent a Fourteenth Amendment challenge. *Id.* at 298.

The court acknowledged that the range of government activities is "broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Id.* at 298. However, the court found that because the city was entirely responsible for sweeping, manicuring, watering, and maintaining the facility, its appointment of private trustees did not, *ipso facto*, dissipate its status as a public facility. The park was therefore subject to Fourteenth Amendment restraints.

The lesson of this case is clear. Mere transfer of ownership will not alter the character of property, if the state continues to manage it as a public facility. The reverse is equally apparent. Performance of functions, not exclusively governmental in nature by a private party, does not make it a state actor.

The Ninth Circuit also cited *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 2d 265, 66 S. Ct. 276, (1946). That case involved a First and Fourteenth Amendment challenge to enforcement of an Alabama criminal trespass statute. The plaintiff was arrested after attempting to distribute religious

literature on the streets of a corporate owned "company town." In deciding that the plaintiff could distribute literature on the town streets without criminal sanction, the court noted that except for private ownership of the land, the town had all the characteristics of any other town—residential buildings, streets, a sewer system, a sewage disposal plant and a business block on which businesses were situated. "In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that title to the property belongs to a private corporation." 326 U.S. at 502. Since the facilities were built and operated primarily to benefit the public, their operation was essentially a public function and the town was subject to state regulation. *Id.* at 504.

This case presents a different fact scenario—the Rose Quarter Commons consists of privately owned buildings which are sometimes open to the general public and some city-owned property, all controlled by a private for-profit company. No Supreme Court case has yet addressed the issue raised by this case—whether operation and maintenance of property that is in part municipally owned is a function exclusively reserved to the state as required under the public function test. While this court has found some functions that satisfy this test—the operation of the town in *Marsh*, the maintenance of the park in *Evans*, the administration of elections of public officials, *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 2d 1152, 73 S. Ct. 809 (1953), it has declined to find exclusive state functions in a number of situations. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982) (the education of children); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978) (private enforcement of a statutory lien); *Blum v. Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (operation of nursing homes). The safeguarding or

management of public property by a private agency has never been considered an exclusive government function. *See Gallagher v. Neil Young Freedom Concert, supra*, at 1456.

Neither has the regulation or limitation of speech activities ever been considered an exclusive government function. *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976) (First Amendment inapplicable to privately-owned shopping mall; absence of state action precludes application of constitutional standards); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972) (First Amendment does not apply to private property, private character is not lost merely because public is invited to use property for designated purposes).

The case cited by plaintiffs and relied on by the Ninth Circuit, *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D. Mass. 1990), held that the Marketplace was a state actor because it was prohibiting protesters from using a public easement, and therefore was functioning like a policeman. *Id.* at 71. As this court pointed out in *Flagg Bros., Inc. v. Brooks, supra*, it "has never considered [whether] the private exercise of traditional police functions [is a public function]." 436 U.S. at 163-64. The other circuits that have addressed the use of private security forces have found no state action. *Gallagher, supra; Wade v. Byles, supra.*

In a recent Oregon Supreme Court decision also involving Oregon Arena, the court held the security forces employed by Oregon Arena were not fulfilling a "public duty" in exercising their authority over crowds at the Arena for purposes of a common law wrongful discharge claim under Oregon law. *Babick v. Oregon Arena Corp.*, 333 Or. 401, 409, 40 P.3d 1059 (2002).

The Ninth Circuit's decision conflicts with other circuits regarding the use of private security forces, and creates new liability under the public function test for any entity that

either leases or controls public property. This court has never interpreted the test this broadly, and in prior decisions has consistently pointed out the need to analyze the function in terms of whether it is truly an exclusive government function. Until this decision, neither the use of private security forces on public property nor regulation of speech activities has been considered an exclusive government function. This case presents this court with the opportunity to clarify the public function test.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed January 10, 2002]

No. 00-35755

DANIEL LEE; MICHAEL CARR; EDWARD GATHRIGHT; and JEREMY SONNIER,
Plaintiffs-Appellants,

v.

VERA KATZ; JAMES FRANCESCONI; CHARLES JORDAN; SHANE NICHOLSON; STEPHANIE DEKOEYER; JOHN MONTGOMERY; J.M. PATTERSON; ROBERT HAWKINS; KIMBERLEY ADAMS; CURTIS CHINN; MACE WINTER; BRIAN DUDDY; STUART PALMITER; TIMOTHY BACON; OREGON ARENA CORPORATION; MICHAEL FENNELL; PIONEER COURTHOUSE SQUARE, INC.; and PORTLAND ROSE FESTIVAL ASSOCIATION,
Defendants-Appellees.

OPINION

Before: DAVID R. THOMPSON, A. WALLACE TASHIMA, and SUSAN P. GRABER, *Circuit Judges*.

THOMPSON, *Circuit Judge*:

The plaintiffs are self-described "street preachers" who brought this lawsuit in the district court under 42 U.S.C. § 1983 seeking to enjoin the defendants' alleged violations of their First and Fourteenth Amendment rights to preach the Gospel of Jesus Christ on the Rose Quarter Commons, an outdoor area next to city-owned public facilities in the city of Portland. Only the Oregon Arena Corporation (OAC) and its

general counsel, Michael Fennell, are parties in this appeal.[1] The other defendants were dismissed either voluntarily or by an order of the district court that the plaintiffs do not challenge.

The OAC leased the Commons and some of the adjacent structures from the City of Portland. In connection with its administration of the leased area, it promulgated policies regulating speech on the Commons. In general, those policies regulated the areas on the Commons where public speaking could occur, the conduct of the speaker and the volume of the speech. Because the plaintiffs violated the OAC's public speech policy, they were excluded from the Commons for limited periods of time. That prompted this lawsuit.

After a bench trial, the district court granted judgment in favor of the OAC. The court determined that the OAC was not a State actor, and thus any abridgment of the plaintiffs' constitutional rights was not State action within the meaning of 42 U.S.C. § 1983. The plaintiffs appeal.

We have jurisdiction under 28 U.S.C. § 1291, and we reverse. We conclude that, in regulating speech on the Commons, the OAC is a State actor. Thus, the plaintiffs' § 1983 action is viable. We remand to the district court for it to determine whether the restrictions imposed by the OAC's public speech policy are reasonable restrictions on the time, place, and manner of protected speech, and are narrowly tailored to serve a significant governmental interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

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[1] Both the OAC and Fennell, who joined in the OAC's appellate brief, were alleged to be "State actors" who violated the plaintiffs' constitutional rights. For purposes of this appeal, we need not consider Fennell's potential liability independent of the OAC. Thus, both are referred to as "the OAC."

I

The Rose Quarter Commons is a large open-air plaza in Portland, Oregon, next to the Rose Garden Arena, Memorial Coliseum, One Center Court, and three parking garages. Portland owns the real property on which the Commons is located, as well as the Coliseum and two of the parking garages. The OAC, a private corporation, owns the rest of the structures, the Arena, One Center Court, and Garden Garage.

The OAC has never challenged the plaintiffs' characterization of the Commons as a traditional public forum. In its brief, the OAC concedes that "the government may impose reasonable time, place and manner restrictions on public for a such as the Rose Quarter Commons." (Emphasis added).

From January 1993 through June 1997, the OAC leased the Commons from the City of Portland. The lease required the OAC to "permit access to and free speech on the Commons as may be required by laws." The lease expired and was not renewed, but the OAC continues to act as the exclusive lessee of the Commons under terms substantially similar to those of the lease.

In its administration of the leased area, the OAC promulgated a Code of Conduct for the Commons that includes free speech policies. The Code prohibits "yelling or screaming with the intention of disturbing persons or disturbing a lawful assembly; or playing radios, musical instruments or any other sound producing or reproducing equipment which is plainly audible at a distance of 25 feet." The Code also prohibits disturbing the peace, acting for the purpose of disturbing the peace, physically threatening anyone, engaging in tumultuous behavior, provoking a disturbance, or embroiling others in open conflict. The OAC's "Petitioning and Free Speech Rules" define free speech as "conduct by a speaker . . . which has a purpose that is constitutionally protected, including the dissemination or distribution of

expressive material." If a person violates the rules, then the OAC may issue an exclusion order barring him or her from returning to the Commons for a limited period.

The OAC designated three free speech zones within the Commons, each approximately 10 feet by 10 feet in size. The OAC believes that by designating these areas for free speech activity it is better able to monitor the safety of both patrons and speakers, in order "to prevent potentially violent confrontations and to maintain the quality of entertainment that the OAC offers at the Rose Quarter." The OAC also asserts that this policy prevents speakers from impeding the high-volume flow of patrons to and from events and parking.

The OAC's policies were developed, and are administered, independent of the City of Portland or any other public entity. The OAC supplied copies of its policies to the Assistant District Attorney of Multnomah County (which county encompasses the City of Portland) and to a sergeant in Portland's traffic division, but did not solicit any governmental comment or approval. The OAC enforces its policies with both in-house security officers and contracted security personnel.

The plaintiffs describe themselves as street preachers who believe it is their religious duty to spread the Gospel of Jesus Christ by engaging in open-air preaching. Such preaching includes making oral statements and carrying signs and banners with religious messages. The plaintiffs engage in this preaching at various locations, including the Commons. On several occasions, persons using the Commons have taken offense at the plaintiffs' conduct and language. Potentially violent confrontations have ensued.[2] The plaintiffs have also,

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[2] For example, on one occasion plaintiff Lee preached so loudly that his voice could be heard over an African marimba band performing on a stage in the Commons. He flailed his arms about, called people in the area whores, and told them they were going to burn in hell. On another occa-

on occasion, violated the free speech zones. In some instances, the OAC has issued orders excluding the plaintiffs from the Commons for specified time periods.

In response to the OAC's exclusion orders, the plaintiffs brought this suit seeking injunctive relief under 42 U.S.C. § 1983, alleging violations of their First and Fourteenth Amendment rights. After a bench trial based primarily on stipulated facts, the district court concluded that the OAC, a private entity, is not a State actor subject to § 1983 liability. The court determined that the City is not entwined with the OAC's management and control of the Commons, the Commons is not encumbered by an easement for public access, and the plaintiffs failed to show that the OAC and its security personnel perform any functions that are exclusively reserved to the City. The court entered judgment for the defendants, and this appeal followed.

II

We review de novo the district court's conclusion that the OAC is not a State actor and review for clear error its findings of fact. *See Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997) (mixed questions of law and fact implicating constitutional rights reviewed de novo); *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (findings of fact reviewed for clear error). The plaintiffs bear the burden of establishing by a preponderance of the evidence that the OAC is a State actor for Fourteenth Amendment purposes. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978).

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sion, his preaching in a similar manner attracted a crowd that physically assaulted him. Plaintiff Gathright also preached in the Commons, calling a woman a whore, a prostitute, and a daughter of Babylon, which incited a shouting match between him and the man escorting the woman.

Conduct that is actionable under the Fourteenth Amendment as State action is also action under color of State law supporting a suit under § 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). "State action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tennessee Secondary Sch. Athletics Ass'n.*, 531 U.S. 288, 295, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974)).

"What is fairly attributable [as State action] is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [No] one fact can function as a necessary condition across the board . . . nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason . . . ." *Brentwood*, 531 U.S. at 295-96. Because of the fact-intensive nature of the inquiry, courts have developed a variety of approaches to the State actor issue. *See id.* at 296 (listing seven approaches to the issue including the coercion test, the joint action test, the public function test, and the entwinement test).

Previously, we expressed uncertainty as to whether satisfaction of a single test could be sufficient to establish that a private entity was a State actor. *See, e.g., George v. Pacific CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (*per curiam*); *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989). However, in Brentwood, the Court determined that the nominally private entity whose conduct was challenged was a State actor solely on the basis that the entity was entwined with the State. The Court held that satisfaction of this single test was sufficient, so long as no countervailing factor existed. *See Brentwood*, 531 U.S. at 304 ("When . . . the relevant facts show perva-

sive entwinement . . . , the implication of state action is not affected by pointing out that the facts might not loom large under a different test.").[3]

Applying this same logic here, the plaintiffs argue that the OAC is a State actor under both the public function test and what they label the "nexus" test. Because we agree with the plaintiffs that in regulating free speech within the Commons the OAC performs an exclusively and traditionally public function within a public forum, we focus only upon the public function test. *See id.* We therefore do not reach the plaintiffs' argument that the OAC is a State actor under what they label the "nexus" test.[4]

Under the public function test, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). To satisfy the public function test, the function at issue must be both traditionally and exclusively governmental. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982).

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[3] Even the four dissenting Justices in Brentwood, who disagreed with the majority's conclusion that entwinement alone could establish a private entity as a State actor, employed a disjunctive analysis to the tests they would apply to determine whether a private entity is a State actor. *See id.* at 305, 309-11 (Justice Thomas dissenting, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy).

[4] We note, however, that in Brentwood the Court treated "nexus" as a status that is found in all cases where private action is attributable to the State, whether that attribution is made under the "pervasive entwinement" test upon which the Court relied in Brentwood, or the public function test upon which we rely today. *See id.* at 295-96; *see also Blum v. Yaretsky*, 457 U.S. 991, 1005, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) ("The required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'") (quoting *Jackson*, 419 U.S. at 353).

The particular public function that the plaintiffs allege the OAC performed was the regulation of free speech within the Commons, a public forum.[5] Previous courts have found this function to be a traditional and exclusive public function. For example, in *Marsh v. Alabama*, 326 U.S. 501, 505-06, 90 L. Ed. 265, 66 S. Ct. 276 (1946), the Court examined whether a company that regulated speech in a shopping district in its privately owned town became a State actor. The Court concluded that it did. The Court explained that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 503. Given that circumstance, the fact that the property is private" is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties." *Id.* at 509. "Ownership does not always mean absolute dominion . . . . [Where] facilities are built and operated primarily to benefit the public . . . their operation is essentially a public function . . . subject to state regulation." *Id.* at 506; *see also Citizens To End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D. Mass. 1990) (holding that a private corporation's regulation of free speech activities on publicly owned land leased by the corporation was a public function, where that land was a public forum over which the public held an easement).

Although not a free speech case, *Evans v. Newton*, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966), is also instructive because it involved the management by private trustees of a city-owned park that previously had been managed by the city. In that case, the Court rejected the

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[5] It is important to identify the function at issue because "an entity may be a State actor for some purposes but not for others." *George*, 91 F.3d at 1230.

argument that the transfer of the park to nominally private control meant that the trustees were not performing a public function. The Court held, after examining the history and use of the park, that "the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." *Id.* at 302.

Here, the Commons functions as a freely accessible public forum through which people pass on their way to shows, concerts, games, and restaurants. The Commons is also a gathering place for public events. Just three days after this case was argued, three thousand people gathered at the Commons for a multi-faith service that was Oregon's largest public event in response to the September 11, 2001 "Attack on America." *See Courtney Thompson, Betsy Hammond, and Erin H. Barnett*, Oregonians Find Comfort, Strength in Many Faiths, The Oregonian, Sept. 15, 2001, at D1. Moreover, as we have noted, the character of the Commons as a public forum is conceded by the OAC.[6] Thus, the regulation of speech in the Commons is a public function and the OAC became a State actor when the City delegated that regulation to the OAC.

We do not hold that everyone who leases or obtains a permit to use a state-owned public forum will necessarily

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[6] The character of the Commons as a public forum was also confirmed in the OAC's former lease. That lease required the OAC to "permit access to and free speech on the [Commons] as may be required by laws." Even without this former lease provision, however, so long as the Commons is a public forum, constitutional protections of free speech within it may not be altered simply because the City has disassociated itself from the OAC's policymaking activities. *Cf. Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961) (silence of lease as to private restaurant's duty to obey Fourteenth Amendment is not decisive because "no State may effectively abdicate its [Constitutional] responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.").

become a State actor. We agree with the Sixth Circuit that, for example, a street festival organizer given non-exclusive powers over a traditional public forum does not, in the absence of other facts, become a State actor when the State maintains the ultimate power to regulate activities in the forum. *See Lansing v. City of Memphis*, 202 F.3d 821, 828-29 (6th Cir. 2000) ("Although [the street festival organizer] had permission from the city to put its streets to special use during the time of the festival, the city retained ultimate control of the streets at all times."). Here, however, Portland retained little, if any, power over the OAC's free speech policies governing the Commons. The OAC's functionally exclusive regulation of free speech within the Commons, a public forum, is a traditional and exclusive function of the State.

The OAC argues it is not a State actor because, unlike in *Faneuil Hall*, 745 F. Supp. at 71, no public easement exists through the Commons. The absence of such an easement, however, does not control our analysis, given the reality that the Commons is a public forum. *See Marsh*, 326 U.S. at 505 n.2 (determination of State court that company town was not "dedicated" under law to public use "does not decide the question under the Federal Constitution" whether company town is a State actor); *Brentwood*, 531 U.S. at 301 n.4 (noting that the State actor determination often emphasizes practical reality over legal formalities). It is the function of the OAC's administration of the Commons that guides and informs our inquiry, not the precise legal arrangement under which the OAC leases the area. That "function" is the administration of free speech rules within a public forum. *Cf. West v. Atkins*, 487 U.S. 42, 55-56, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988) (contract physician is a State actor even though not a State employee because "it is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State").

The OAC asserts that the policing of the Commons is not an exclusive public function, citing *Wade v. Byles*, 83 F.3d 902, 904-06 (7th Cir. 1996). In Wade, the Seventh Circuit held that a private security guard was not a State actor because, even though his exercise of limited police powers over a public housing project was a traditional public function, it was not an exclusively public one. The present case, unlike Wade, does not turn on whether the use of limited police powers on public land is a public function. It turns on what is quintessentially an exclusive and traditional public function—the regulation of free speech within a public forum.

We conclude that, in regulating speech within the Commons, the OAC performs an exclusively and traditionally public function within a public forum. "There being no offsetting reason to see the [OAC's] acts in any other way," *Brentwood*, 531 U.S. at 291, we need not consider whether the implication of State action would be affected by other facts that "might not loom large under a different test." *Id.* at 303. In regulating free speech within the Commons, the OAC is a State actor.

III

The OAC's status as a State actor does not end this case, but it does, for the moment, end this court's inquiry. The OAC may still "impose reasonable restrictions on the time, place, or manner of protected speech [within the Commons], provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)). The district court did not reach this question, which involves a factual inquiry best undertaken by that court.

On remand, the district court shall determine whether any or all of the OAC's free speech policies and procedures are reasonable time, place, and manner restrictions. Although the district court will, of course, separately evaluate all challenged aspects of the OAC's policies and procedures, we draw its attention in particular to the need for further factfinding as to the reasonableness of: (1) the noise limits imposed by the OAC; (2) the rule banning the wearing of sandwich boards; and (3) the designation of limited free speech zones, including both the policy in general and its specific provisions identifying the size, location, and number of such zones. We express no opinion on the merits of these issues.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed May 31, 2000]

CV 00-310-PA

DANIEL LEE, *et al.*,

Plaintiffs,

v.

VERA KATZ, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PANNER J.

Plaintiffs, Daniel Lee, Michael Carr, Edward Gathright, and Jeremy Sonnier, filed this action against defendants, including City of Portland,[1] Oregon Arena Corporation,[2] and Portland Rose Festival Association. Plaintiffs bring claims under 42 U.S.C. § 1983, alleging that defendants have violated and continue to violate plaintiffs' rights to speech as protected by the First Amendment, that defendants have violated and continue to violate plaintiffs' rights to religion as protected by the First Amendment, that defendants have

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[1] This opinion collectively refers to defendants Vera Katz, James Francesconi, Charles Jordan, Shane Nicholson, Stephanie Dekoeyer, John Montgomery, Robert Hawkins, Kimberly Adams, Curtis Chinn, Mace Winter, Brian Duddy, Timothy Bacon, and Pioneer Courthouse Square, Inc. as the City of Portland. Defendants J. M. Patterson and Elmer Button, private security officers contracted to provide security at Pioneer Courthouse Square, have not been served with this action.

[2] This opinion collectively refers to defendants Oregon Arena Corporation and Michael Fennel as Oregon Arena Corporation.

violated the Fourth Amendment rights of Lee, Sonnier and Gathright to be free from unreasonable seizures of their persons, and that defendants have violated ORS 181.575 by collecting and maintaining information about plaintiffs. Plaintiffs also allege that defendants have breached contracts between City of Portland, Oregon Arena Corporation and Portland Rose Festival Association to which plaintiffs are third party beneficiaries. Plaintiffs seek injunctive and declaratory relief, compensatory and punitive damages.

On April 5, 2000, plaintiffs moved for a preliminary injunction, seeking the following relief: (1) suspension of all exclusions issued by defendants against plaintiffs for plaintiffs' open air preaching; (2) enjoin City of Portland from enforcing PCC 20.08.060 against plaintiffs while they are engaged, in open air preaching; (3) enjoin Oregon Arena Corporation from enforcing its written free speech policy against plaintiffs while they are engaged in open air preaching at the Rose Quarter; and (4) enjoin Portland Rose Festival Association from enforcing its regulations that prohibit wearing signboards during the Rose Festival at Waterfront Park. Defendants opposed the motion for a preliminary injunction. After reviewing the parties' submissions on the preliminary injunction motion, this court determined that no material factual disputes existed and suggested that the parties submit the issue of permanent injunctive relief to the court for resolution at this time. The parties agreed. The court ordered that the issues of relief be bifurcated such that the issue of permanent injunctive relief be resolved first, and if necessary, the additional issues of relief would be handled in a separate proceeding.

The court then conducted a court trial on the merits of permanent injunctive relief. The parties submitted stipulated facts. The parties also relied on their witness statements, and no party requested the opportunity to cross-examine another party's witnesses. Additionally, all exhibits submitted by the

parties were received into evidence without objection. On May 4, 2000, the court heard oral argument on the legal issues and requested supplemental briefing. The following constitutes my Findings of Fact and Conclusions of law. Fed. R. Civ. Pro. 52(a). For the reasons explained below, I dismiss in part and deny in part plaintiffs' claims for permanent injunctive relief.

FINDINGS OF FACT

Plaintiffs are street preachers who believe it is their religious duty to spread the Gospel of Jesus Christ by engaging in open air preaching. Open air preaching includes making oral statements and carrying signs and banners with religious messages. Open air preaching is an essential part of plaintiffs' religious practices, and plaintiffs believe that they must contact the general public to spread the Christian Gospel. Plaintiffs engage in open air preaching at various locations in Portland, including the Pioneer Courthouse Square, Rose Quarter Commons and Waterfront Park. Plaintiffs' claims for permanent injunctive relief stem from incidents occurring at those three locations.

1. City of Portland

Defendant City of Portland (the City) maintains a system of parks for the recreation and enjoyment of the public. People who want preferential use of a City Park may obtain a permit for an event. Pioneer Courthouse Square (the Square) is a City Park in the center of downtown Portland. The Square is an outdoor brick plaza between Southwest Broadway and Southwest Sixth Avenue and between Southwest Yamhill Street and Southwest Morrison Street. *See Rohman v. Citv of Portland*, 909 F. Supp. 767, 769 (D. Or. 1995) (describing Pioneer Courthouse Square). This City Park is managed by Pioneer Courthouse Square of Portland, Inc. (PCSI), a private, nonprofit corporation.

In part, the mission of the Square is to provide programs and events that will draw visitors and enliven the atmosphere of downtown Portland. The income from the permit fees is an important component of PCSI's budget for its management activities. The City and PCSI used to have a written policy regarding the protection of free speech rights of persons in the Square. That policy was declared unconstitutional by this court in *Rohman*, and a permanent injunction against its enforcement was issued on April 6, 1996. Currently, the City and PCSI do not have a written policy regarding free speech activities in the Square. People are free to engage in expressive activity at all City Parks, at all times and in all places that the Parks are open to the public, except to the extent that people unreasonably interfere with permitted events or violate some other generally applicable law or regulation.

From July 9 through July 11, 1999, the Kids on the Block Awareness Program, an Oregon nonprofit corporation, held an exclusive permit for an event called "Sand in the City" in the Square. The Kids on the Block Awareness Program uses puppets to help children accept and understand differences in one another and learn to protect themselves in difficult situations. The annual event is intended to raise public awareness and financial support for the Kids on the Block Awareness Program's efforts to educate children. Corporate sponsors build sand sculptures in the Square for public viewing. During the event, the Kids on the Block Awareness Program puppeteers circulated through the Square, demonstrating their puppet shows and interacting with the children. Also, performers regularly performed at an entertainment stage.

On Saturday, July 10, 1999, plaintiff Daniel Lee, a fulltime campus preacher and street preacher, engaged in open air preaching at the Square. He preached loudly at the people in the Square, calling them "whores" and telling them that they were "going to burn in Hell." Lee was preaching loud enough that the program coordinator of the Kids on the Block Awareness Program heard Lee's preaching over the music of

an African marimba band performing on the entertainment stage. People listening to the music were distracted by Lee's preaching and complained to Lee and asked him to leave. Lee left the stage area and moved to the top of a brick wall on the north side of the Square. Security officers asked Lee to get off the wall, and Lee did so. Lee continued preaching loudly from the sidewalk, calling people passing by "whores" and telling them they were "going to Hell." Several adults and children were annoyed and bothered by the volume of Lee's preaching. Upon the permittee's request, security officers asked Lee to preach less loudly so that his preaching would not unreasonably interfere with the event. Lee refused to lower his voice, and the police were called.

Portland police officers approached Lee while he was preaching and asked him to lower his voice and talk with them. Lee refused to cooperate with the police officers, and he continued to preach. Police Officer Shane Nicholson describes Lee's preaching as yelling and screaming at the crowd in the Square. Officer Nicholson estimates that 300 people were in the Square while Lee was preaching. As he preached, Lee flailed his arms at the crowd, and Lee's arm struck Officer Nicholson on the right ear and shoulder. The police officers arrested Lee and took him into custody. Lee was cited for harassment, unlawful interference with a permitted activity, PCC 20.08.060, and failure to obey the reasonable direction of a park officer. Lee was issued a 30-day park exclusion.

After the quasi-criminal proceeding on Lee's violation of PCC 20.08.060, Multnomah County Circuit Court Judge Henry Kantor declared the city ordinance unconstitutional on the grounds that one ordinance was overly broad in violation or the First Amendment and declared the ordinance invalid.

2. Oregon Arena Corporation

Defendant Oregon Arena Corporation (OAC) is a private corporation that operates the Rose Quarter Commons, which

is an open air plaza surrounding the Rose Garden Arena, Memorial Coliseum, One Center Court, and the Garden Garage. This entire area including the various structures is referred to as the Rose Quarter. The City owns most of the real property that the Rose Quarter is located upon. Memorial Coliseum and two parking garages are also owned by the City. OAC owns the balance of the structures, including the Rose Garden Arena, One Center Court and the Garden Garage. The City owns the real property referred to as the Rose Quarter Commons.

From January 23, 1993 through June 30, 1997, OAC leased the Rose Quarter Commons from the City for sole occupation and use as lessee. The lease required OAC to "permit access to and free speech on the Plaza as may be required by laws." That lease was not renewed, but OAC continues to act as the exclusive lessee and operator of the Rose Quarter Commons. OAC rents out portions of the Rose Quarter Commons for private and public events, and OAC remits 80% of the revenues from such rentals to the City.

OAC's general counsel, defendant Michael Fennell, prepared a Code of Conduct, which includes free speech policies that governs the Rose Quarter Commons. The Code prohibits anyone from "[y]elling or screaming with the intention of disturbing persons or disturbing a lawful assembly; or playing radio's, musical instruments or any other sound producing or reproducing equipment which is plainly audible at a distance of 25 feet." The Code designates "certain areas which are available on a first-come, first-served basis for petitioning and free speech." In addition to the Code of Conduct, the OAC has "Petitioning and Free Speech Rules." The Rules define free speech as "conduct by a speaker . . . which has a purpose that is constitutionally protected, including the dissemination or distribution of expressive material." The Rules provide that free speech activity "may occur only during the hours the Rose Quarter Commons is open to the

public and will not be allowed when the Rose Quarter Commons is under permit for an event that includes the petitioning and free speech areas." Three locations are designated at the Rose Quarter Commons as areas for petitioning and free speech activities. These areas are approximately 10 feet by 10 feet in size. OAC selected the locations of the areas by considering "the size and physical design of the Rose Quarter Commons, the placement of permanent and semi-permanent objects on the Rose Quarter Commons and the need for maintaining an unobstructed traffic flow through, around, and across the Rose Quarter Commons." OAC's purpose in drafting the Code and the Free Speech Rules was to provide for "safe and reasonably unobstructed crowd control,[3] while still giving individuals the ability to exercise First Amendment rights to passersby." OAC's goal was "to allow activists or speakers to engage any patrons who wished to communicate with the speakers, but to do so without unnecessarily and unsafely obstructing the flow of pedestrian traffic into and out of the buildings."

OAC enforces the Code of Conduct and Free Speech Rules with both in-house security officers and contracted security personnel. Both the in-house and contracted security officers are instructed by OAC to impartially and fairly enforce the Code and the Rules in the Rose Quarter Commons. A variety of individuals and interest groups have utilized the designated areas without incident over the past 3½ years. However, on several occasions, patrons of the Rose Quarter Commons have taken offense at the conduct of plaintiffs while plaintiffs are engaged in open air preaching both in and out of the designated areas, and potentially violent confrontations have occurred between plaintiffs and patrons. OAC believes that it must protect the safety of both patrons of the Rose Quarter

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[3] The Rose Garden Arena's capacity is approximately 20,000 people, and Memorial Coliseum's capacity is approximately 11,000 people. At times, both venues are used simultaneously.

and individuals engaging in free speech activity in the Rose Quarter Commons. By having designated areas for free speech activity, OAC believes it is better able to monitor the situation, to prevent potentially violent confrontations and to maintain the quality of entertainment that OAC offers at the Rose Quarter.

Plaintiffs, Daniel Lee, Michael Carr, Edward Gathright, and Jeremy Sonnier, frequently engage in open air preaching at the Rose Quarter Commons. Plaintiffs especially prefer to preach at the Rose Quarter Commons when large events are occurring at either the Rose Garden Arena or the Memorial Coliseum. Within the past year, plaintiffs have had numerous encounters with OAC's security officers and Portland police officers involving OAC's enforcement of its Code of Conduct and Free Speech Rules.

The parties have submitted witness affidavits describing the encounters between plaintiffs, and OAC security personnel and the Portland police. Additionally, plaintiffs have submitted several videotapes that show plaintiffs preaching and carrying signs at the Rose Quarter Commons on eight different occasions. Nearly all of these videotapes show plaintiffs' preaching activities at the Rose Quarter Commons after this lawsuit was filed and, as plaintiffs state on the videotapes, plaintiffs would usually preach outside the designated areas when they were videotaping and they would preach inside the designated areas when they were not videotaping. In addition to the witness affidavits., some of the videotapes show encounters between plaintiffs and OAC's security personnel and Portland police officers. Several encounters are described below and are fairly representative of plaintiffs' allegations regarding the free speech policy at the Rose Quarter Commons.

On April 15, 1999, Portland police officers were assigned to crowd control at the Rose Quarter because more than 30,000 people were expected to attend dual concerts, one at

the Rose Garden Arena and one at Memorial Coliseum. While observing the crowd between the Rose Garden Arena and Memorial Coliseum, Sergeant Kim. Adams and Officer Rob Hawkins received complaints from several young women that a man was calling them "whores," "sluts," and "Jezebels," and declaring that they were "going to Hell." The police officers advised the women that the man was standing in a free speech area from which he was permitted to say anything he desired. The officers told the women to avoid and ignore the man. After the police officers received several more complaints and observed that an argument was taking place between the man and a patron, the officers went to check out what was happening.

The officers observed Gathright engaged in a heated discussion with a young man and woman. Another young man escorting a young woman passed near Gathright, and Gathright called the woman a "whore," a "prostitute", and a "daughter of Babylon." The man escorting the woman was extremely offended, and a shouting match between the man and Gathright, followed. The police officers intervened and attempted to diffuse the situation. Gathright continued to "provok[e] strangers with language [the officers] believe was intended to evoke an emotional, if not physical response." Concerned about Gathright's safety, the police officers asked Gathright to leave the Rose Quarter Commons. Gathright refused, and the police officers arrested him for disorderly conduct and removed him from the area. Another police officer drove Gathright to his car. Gathright claims he was spit on by one the patrons he engaged with his preaching.

On September 12, 1999, Sonnier was standing near the fountain at the Rose Quarter Commons but outside of a designated area. Sonnier was standing with a sign and engaging in some preaching. Sonnier claims that one man thanked him for doing what he was doing. An OAC security officer told Sonnier that he must move to a free speech area.

Sonnier told the security officer that he believed OAC's management approved of free speech activities anywhere in the Rose Quarter Commons when no event was taking place. Portland police officers were summoned to the Rose Quarter Commons to assist OAC's security officers enforce OAC's free speech rules. The police officers approached Sonnier who was still standing outside of a designated area. The police officers explained to Sonnier that if he wished to engage in free speech activities at the Rose Quarter Commons, Sonnier would need to move to a designated area or a public sidewalk. Sonnier did not argue or resist the police officers. Sonnier was issued an exclusion order, and he left the Rose Quarter Commons.

On September 17, 1999, at the Rose Quarter Commons, Jessica Gachupin and her fifteen-year old daughter were passing out flyers to a music concert, but they were not within a designated area. OAC's security officers claim they told Gachupin that she must either move to a designated area or to a public sidewalk. Gathright was also at the Rose Quarter Commons wearing a signboard, which expressed his religious views. Security officers asked Gathright to move to a free speech area.

After the security officers' instructions to move, Gachupin the flyers from a designated area and the public sidewalks. Sometime later, she crossed the plaza, and she was by men with a religious sign, a video camera and religious placards. She was told by them that she was not allowed to pass out flyers in the plaza unless she was in a free speech area. She felt they were angry at her because they thought she was passing out flyers outside of a designated area. She claims that the men began to verbally harass her, intending to create a scene. The men told her she should "become a submissive wife," that she should "return to the kitchen," they referred to her as a "bloody tampon," and they told her she was for passing out the flyers. She was videotaped by the men, and

she asked them to stop and told them she did not give them permission to tape her. Gachupin's daughter approached Gauchupin while the men were harassing her. The men told Gachupin's daughter that she was a "whore" for wearing shorts and a halter top and that she was "going to Hell with her mother." Gachupin's daughter was fearful of the men, and Gachupin was outraged by their conduct. Gachupin shouted at the men and grabbed one of their notebooks. Security officers intervened and removed the most verbal man from the scene.

As mentioned above, around the time this lawsuit was filed, plaintiffs began videotaping their preaching sessions at the Rose Quarter Commons, and plaintiffs submitted six videotapes of those preaching sessions. Several of the videotapes show Lee preaching outside the designated areas, and the videotapes show OAC's security personnel request that Lee preach from a designated area. Lee either ignores the security officer's request or he tells the officer that he is not required to preach from the designated area. For example, on March 7, 2000, Lee preached outside the designated areas with a megaphone to amplify his voice. A large crowd had gathered around him and were generally hostile towards Lee and his preaching. Security officers attempted to remove Lee from the scene, but Lee flailed his arms at the officers and told them not to touch him. Lee continued to preach into his megaphone. The crowd became emboldened, and the crowd physically and verbally attacked Lee and his cameraman. However, on other occasions, Lee and other plaintiffs preached or carried signs outside the designated areas without security asking them to move to the designated areas.

3. Portland Rose Festival Association

Defendant Portland Rose Festival Association (PRFA) is a private, not-for-profit corporation qualified for tax-exempt status under section 501(c)(4) of the Internal Revenue Code. PRFA's mission is to promote civic pride and awareness

through numerous civic festival activities produced by PRFA for the enjoyment of the general public. PRFA's festival activities revolve around the symbol of the rose and utilize the natural beauty of the State of Oregon with an emphasis on the state's indigenous flora and fauna. The purpose of the festival is to provide good, clean, safe, family-oriented entertainment for patrons of the Rose Festival. PRFA receives funding from a variety of sources including gate receipts, private contributions, and sponsorship. PRFA does not receive contributions from local governments.

PRFA operates a number of different events during the Rose Festival, including the Festival Center in Waterfront Park. PRFA obtains a permit from the City to use Waterfront Park for the Festival Center. PRFA's permit covers a large area of Waterfront Park, including the Esplanade. The City provides the assistance of its traffic department and its police department. In large part, a small permanent staff and a large crew of volunteers staff the Festival Center, and PRFA hires a private security company to provide security for the Festival Center. The City plays no significant active role in planning or managing the Festival Center, except to coordinate the public safety aspects of PRFA's events. The City does provide a larger police presence during the Festival Center, and a temporary on-site jail is constructed at the Festival Center.

The Rose Festival is an annual event that occurs in June at locations around the greater Portland metropolitan area. The Festival Center is located at Waterfront Park, and the main entrance to the Festival Center is located under the Morrison Bridge. A significant flow of traffic often occurs at the location. Also, a fire lane and vehicle access point are located under the Morrison Bridge.

PRFA's policy for safety and security for the Festival Center at Waterfront Park requires that PRFA regulate certain conduct of patrons of the Festival Center that pose a safety hazard to other patrons. Conduct that poses a safety hazard to

any patron is prohibited. Certain areas pose greater safety concerns. Also, hazardous conduct that restricts the flow of traffic in and out of the Festival Center and vendor tents is prohibited. PRFA's security personnel asks persons creating such safety hazards to move or to conduct themselves in a manner that does not create a safety hazard.

In June 1999, plaintiff Michael Carr alleges that on three occasions he was prohibited by PRFA's security personnel from entering various locations at the Festival Center. First, he was stopped from entering a vendor's tent while wearing a sideboard, which expressed religious views. The security officer told Carr that if he removed the signboard, he would be permitted to enter the tent. Two days later, Carr was prohibited from walking in front of a music stage while people were dancing and he was wearing his signboard. Several days later, a Portland police officer told Carr that he must remain on the promenade area while wearing a signboard and that he was prohibited from walking on the grass area while wearing the signboard.

Carr has been told by PRFA officials that he cannot wear a signboard in certain areas because of safety concerns such as restricting aisle ways, access points and crowded areas, and the possibility that the signboard could be used as a weapon during an altercation or civil disturbance. Carr has contacted defendant Vera Katz, Mayor of the City of Portland, about his problems at the June 1999 Rose Festival.

CONCLUSIONS OF LAW

Plaintiffs filed this action under 42 U.S.C. § 1983, seeking permanent injunctive relief against defendants to enjoin defendants from engaging in "objectionable practices" that plaintiffs contend violate their constitutional rights of free expression and free exercise of religion. To prevail on Section 1983 claims, plaintiffs must establish that an action taken under color of state law has deprived them of rights secured

under the United State Constitution or laws of the United States. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). The acts of private parties are sometimes considered acts taken under color of state law. *E.g., George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996), *cert. denied*, 519 U.S. 1081 (1997). Courts construe acts of private parties as public acts "sparingly" in order to preserve individual freedom by limiting the reach of federal judicial power and law. *Mathis v. Pacific Gas and Elec. Co.*, 75 F.3d 498, 501 (9th Cir. 1996) (citing *Lugar v. Edmondson Oil Co.*, Inc., 457 U.S. 922 (1982)). Federal courts have applied "joint action", "public function", "state compulsion", and "close nexus" tests to determine whether the conduct of private parties should be construed as state action. *George*, 91 F.3d at 1230.

1. The City of Portland

Plaintiffs seek a permanent injunction enjoining the City from enforcing PCC 20.08.060 on the grounds that Judge Kantor declared the ordinance unconstitutional and invalid. For his conduct at the Sand in the City event, Lee was arrested for violating PCC 20.08.060, which provides, in part: "It is unlawful for any person unreasonably to interfere with a permittee's use of a Park." At the quasi-criminal hearing on the information charging Lee with various violations including violating PCC 20.08.060, Lee and the City agreed that the City would offer evidence that Lee was preaching loudly and flailing his arms wildly on a sidewalk in or adjacent to the Square during the Sand in the City event, which was a properly permitted event. The parties also agreed that Lee would offer evidence that Lee was not interfering, reasonably or unreasonably, with anyone's use of the Square. Lee also asserted that he was not inside the Square.

Instead of resolving any of the factual disputes, Multnomah County Circuit Court Judge Henry Kantor addressed Lee's arguments that the ordinance was "unconstitutionally vague

and/or overbroad because it appears to prohibit free speech uttered in or near a park." In a written opinion, the state court determined that the quasi-criminal proceeding on Lee's motion to dismiss the information against him could be decided "more simply on federal First Amendment overbreadth grounds." The state court decided not to address any arguments made under the Oregon Constitution. Relying on the three-part test in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), Judge Kantor concluded that while the ordinance was "obviously content neutral," the phrase "unreasonably unreasonably to interfere" was "far too broad to not sweep into its reach any protected speech, which any permittee, user, guard, or police officer concludes might be unreasonable." The state court concluded that the actual effect of the ordinance is censorship. The state court declared PCC 20.08.060 to be unconstitutionally overbroad and therefore invalid. The City decided not to appeal that decision.

Plaintiffs believe that the City has not repealed PCC 20.08.060. Plaintiffs fear that the invalid ordinance will be used against them in the future, and therefore, plaintiffs seek a permanent injunction enjoining the City from enforcing the ordinance. Prior to Lee's arrest, the City had not enforced PCC 20.08.060 against any of the other plaintiffs or any other person, and after Lee's successful challenge, the City has not enforced the ordinance against anyone else. However, at oral argument, the City stated that it had not decided whether to continue to enforce PCC 20.08.060, or whether to rewrite the ordinance. The City raises several arguments against granting plaintiffs injunctive relief. Primarily, the City argues that the state court decision declaring PCC 20.08.060 unconstitutional is wrong in numerous respects, that this court should conclude that the ordinance is constitutional in light of *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (March 29, 2000), and that this court should overrule the contrary state court decision. Both plaintiffs and the City are asking this court to

review the state court decision declaring PCC 20.08.060 unconstitutional in deciding whether to grant injunctive relief to plaintiffs.

Federal district courts, as courts of original jurisdiction, have no authority to review the final determinations of a state court in judicial proceedings. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (district courts have no power to sit in direct review of state court decisions); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986) (same). Only the United States Supreme Court may take direct review of state court decisions. *See* 28 U.S.C. § 1257. This doctrine, known as the *Rooker-Feldman* doctrine, applies even when the challenged state court decision involves federal constitutional issues, because state courts are as competent as federal courts to resolve federal constitutional issues. *McNair*, 805 F.2d at 891. The Supreme Court has explained that when a district court is presented with a constitutional claim that is inextricably intertwined with a state court's decision, then the district court is in essence being called upon to review the state court decision. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483-84 (1983).

In general, a case invoking the *Rooker-Feldman* doctrine involves one party seeking relief against the other party in state court; a party is denied the desired relief in state court; and that party files in federal court a section 1983 action against the other party seeking the desired relief. The factual circumstances of this case are unusual: (1) the City brought an action against one of the plaintiffs, Lee, alleging that he had violated PCC 20.08.060; (2) Lee challenged the ordinance as unconstitutional and the state court declared PCC 20.08.060 facially unconstitutional on overbreadth grounds; (3) in the state court proceeding, Lee was the defendant and the City was the prosecutor; (4) in this federal court proceeding, the roles are reversed in that Lee is now one of four plaintiffs and the City is a defendant; (5) Lee succeeded, rather than failed, in getting-the-relief he desired in the state

court proceeding; (6) Lee along with three other plaintiffs are seeking injunctive relief in federal court to enforce the state court decision; and (7) the City, as a defendant in this federal court proceeding, is seeking to reverse the state court decision. Although this is not a typical *Rooker-Feldman* case, the fundamental principle is the same: plaintiffs' request for injunctive relief presents a constitutional challenge that is "inextricably intertwined" with a state court decision, and resolution of the challenge by this court would require review of the state court decision. According to the principles underlying the *Rooker-Feldman* doctrine and 28 U.S.C. § 1257, 1 conclude that this court lacks subject matter jurisdiction to address plaintiffs' claim for injunctive relief against the City. In any event, I conclude that plaintiffs' chances of success on the merits are remote. Plaintiffs' claim for injunctive relief against the City is dismissed.

2. The Rose Quarter Commons

Defendant OAC has enforced its Code of Conduct and Free Speech Rules at the Rose Quarter Commons against plaintiffs on numerous occasions. As described above, OAC's security personnel has requested that plaintiffs engage in free speech activities only from the designated free speech areas, and plaintiffs have been asked to leave and arrested for trespassing for not complying with OAC's Code and Rules. Plaintiffs seek to enjoin OAC from enforcing its Code of Conduct and Free Speech Rules against them while they are engaging street preaching and carrying signs with religious messages.

Plaintiffs bring their claim for injunctive relief against OAC under 42 U.S.C. section 1983. Plaintiffs allege that OAC is a state actor under the public function test because in policing the Rose Quarter Commons, OAC is performing the public function of deciding who can use City property. OAC responds that it is not a state actor under the public function test or any other applicable test.

Ordinarily, section 1983 liability for violating a person's constitutional rights attaches only to the acts of government officials. *Johnson v. Knowles*, 113 F. 3d 1114 (9th Cir.), *cert. denied*, 522 U.S. 996 (1997). However, private parties may be held liable under section 1983 and the "public function" test if the private party performs a function that has been "traditionally the exclusive prerogative of the State. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

Plaintiff relies on *Evans v. Newton*, 382 U.S. 296 (1966) for the argument that OAC exercises functions traditionally and exclusively reserved to the state. In *Evans*, land was bequeathed to the Mayor and City Council of Macon, Georgia as trustee to be used as a park for "white people only." The park was managed by a board of managers, and the city allowed the park to remain segregated for many years. However, over time, the city took the position that the park was a public facility, and as such, the city could not manage it as a segregated park. The members of the board of managers brought suit to remove the city as trustee and, to appoint a new trustee to whom title could be transferred. The court removed the city as trustee and appointed private trustees. However, the city continued to maintain the park by sweeping, watering and patrolling the park grounds. The Supreme Court recognized that the city officials were working in tandem with private actors to perpetuate racial discrimination. Therefore, the court held that if the city remained entwined in the management or control of the park, it would remain subject to the restraints of the Fourteenth Amendment.

Plaintiffs have not shown that the City is entwined with the management or control of the Rose Quarter Commons such that the City would remain subject to the Fourteenth Amendment. Moreover, *Evans* does not address whether the private actors in that case were state actors based on their conduct. *Evans* does not assist plaintiffs' argument that OAC is a state actor based on the public function test or any of the other tests.

Plaintiffs also rely on *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D. Mass 1990). In that case, the Faneuil Hall Marketplace (the Marketplace) leased its land from the city. Protesters gathered at the Marketplace to pass out leaflets and to protest the inhumane treatment of calves used for veal. A commercial tenant complained to the Marketplace security about the protestors. The Marketplace's security officers told the protestors that they could not protest on private property and asked them to disperse. When the protestors refused to leave, the police were summoned. Two of the protestors were arrested for trespassing, although most protestors dispersed when the police responded to the Marketplace. The protestors sued the Marketplace for violations of section 1983, among other claims.

The court in *Citizens to End Animal Suffering* concluded that the sidewalks upon which the protestors were protesting were encumbered by an easement for public access, and by determining who could use the public sidewalks, the Marketplace was performing a function more akin to a policeman or a state legislature.

As the parties have stipulated in this proceeding, OAC independently owns facilities in the Rose Quarter, and it exclusively operates the Rose Quarter Commons, which is City property. At one time, OAC formally leased that property from the City. Currently, no formal lease has been executed between the City and OAC. Nonetheless, the City permits OAC to operate the Rose Quarter Commons in the same exclusive manner as OAC did under the formal lease. OAC is the lessee and exclusive operator of the Rose Quarter Commons. As such, OAC employs in-house and contracted security personnel to protect the property and to control the crowds of patrons that visit the Rose Quarter for scheduled events. There is no evidence that the Rose Quarter Com-

mons is encumbered by an easement for public access, and plaintiffs' reliance on *Citizens to End Animal Suffering* is misplaced.

In *Wade v. Byles*, 83 F. 3d 902 (7th Cir.), *cert. denied*, 519 U.S. 935 (1996), the Seventh Circuit Court of Appeals concluded that a private security officer employed to provide security to public property was not performing duties that transformed him into a state actor. *Id.* at 905-06. The *Wade* court concluded that powers such as carrying a handgun, arresting people for criminal trespass pending arrival of the police and using deadly force in self-defense are not powers that are exclusively reserved to the police. *Id.* at 906. The court recognized that those types of powers were commonly employed by a private security officer on private property. *Id.* The court held that the fact the private security officer performed his duties on public property, or for the public's benefit, does not make him a state actor. *Id.*

Similarly, OAC is a private corporation that employs both in-house security personnel and contracts with outside security personnel to staff large events at the Rose Quarter. The duties those security personnel perform include enforcement of OAC's Code of Conduct and Free Speech Rules. In enforcing the Code and the Rules, OAC's security personnel performs no greater duties and has no greater powers than the security officer in *Wade*. Plaintiffs have failed to show that OAC and its security personnel are performing any functions that are exclusively reserved to the state. Plaintiffs have failed to show that OAC is a state actor based on the public function test, and the evidence does not support a conclusion that OAC is a state actor under any of the other tests. Plaintiffs' Section 1983 claim against OAC is denied.

3. The Portland Rose Festival Association

During the 1999 Portland Rose Festival, defendant PRFA enforced its safety regulations against plaintiff Michael Carr and requested that he not enter certain areas of the Festival

Center at Waterfront Park during the Rose Festival while wearing a signboard. Plaintiffs bring a claim under section 1983 against PRFA for violating their First Amendment rights. Plaintiffs seek to enjoin PRFA from enforcing safety regulations that would prohibit plaintiffs from entering any part of the Festival Center while wearing a signboard with religious messages. Plaintiffs allege that PRFA is a state actor under the joint action, public function and close nexus tests. PRFA disputes that it is a state actor.

Under the joint action test, a private party who willfully participates with state officials may be considered to have acted under color of state law within the meaning of section 1983. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). Private parties may be liable under this joint action test only if their actions are "inextricably intertwined with those of the government." *Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 503 (9th Cir. 1996). The joint action test is satisfied if state and private parties agree to violate constitutionally protected rights. *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). However, more than mere acquiescence is required to establish that a private party has "intended to join or further" a conspiracy with a state action. *Id.*

Similarly, a private party may be a state actor when a sufficiently close nexus exists between the State and the action of the private party. *Gorenc v. Salt River Project Agr. Imp. and Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989). The Supreme Court has concluded that such a nexus may exist if the public entity derives such profit from the activities of the private party that a symbiotic relationship exists between the two. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

Plaintiffs contend that because PRFA has established safety regulations based on directives from the Portland Police Department and the Portland Fire Department, PRFA is jointly acting with the state in enforcing its safety

regulation. Plaintiffs also argue that PRFA and the City have a symbiotic relationship in that PRFA receives funds from the City for the Rose Festival and the City earns money from the Rose Festival.

PRFA first responds that "if everyone who followed the direction of the Fire Marshal were a state actor, [then] everyone who owns a building in Oregon would be a state actor, since all buildings must abide by the State Fire Code, which is enforced by the Fire Marshal." Similarly, PRFA responds that "if everyone who follows the direction of the police were a state actor, virtually everyone in the state would be a state actor."

The Sixth Circuit recently addressed the issue of whether a festival association was a state actor in the context of a street preacher engaged in open air preaching at a festival. *Lansing v. City of Memphis, et al.*, 202 F. 3d 821 (6th Cir. 2000). The court addressed the issue of whether the festival association that plans and coordinates the annual Memphis in May festival was a state actor for the purpose of liability under 42 U.S.C. section 1983. In *Lansing*, the plaintiff was a street preacher who engaged in open air preaching at several Memphis in May festivals from a location near the festival entrance on a city street between the traffic barricades and the event barricades. During peak attendance periods, Memphis in May officials have asked the plaintiff to move 50-300 feet away from his preferred preaching location. The plaintiff brought suit against Memphis in May under Section 1983, alleging that Memphis in May violated his First Amendment right by making him move away from his preferred preaching location during the festival.

The *Lansing* court analyzed whether the festival association was a state actor under the public function, state compulsion and close nexus tests, and the court concluded that the festival association was not a state actor under any of the those tests. With respect to the close nexus test, the court

made the following conclusions: (1) conferring an economic benefit on the City is insufficient to establish that the festival association is a state actor; (2) receiving minimal funding from government sources is not sufficient to convert decisions of the festival association into state action; (3) leasing a park and contiguous public ways from the City does not convert the festival association from a private actor to a state actor; (4) complying with the City's requirements that the festival association coordinate with City agencies regarding the regulation of alcoholic beverages, advertising, traffic and security at the festival demonstrates the independence of the City's operations from the festival's operations; and (5) requesting police officers to help enforce the festival association's decision to remove a street preacher does not establish the festival association as a state actor.

The facts of this case are analogous to the facts of *Lansing*. PRFA obtains a permit from the City to use Waterfront Park for its annual Rose Festival. PRFA does not receive any funding from the City for the Rose Festival. The Rose Festival does confer an economic benefit on the City. PRFA coordinates the regulation of certain activities, like traffic and police assistance with the City's agencies. However, for the most part, PRFA plans, coordinates and manages the Rose Festival without, assistance or input from the City. PRFA does regulate conduct that poses a safety hazard to Rose Festival patrons based upon directives from the Portland Fire Marshal and the Portland Police Department. However, none of these facts is sufficient to establish PRFA as a state actor under the close nexus test.

Analyzing the facts of this case under the joint action test, plaintiffs have also failed to establish an agreement or conspiracy between the City and PRFA with respect to the Portland Rose Festival. The joint action test requires a substantial degree of cooperation between the state actor and the private actor. *Collins v. Womancare*, 878 F. 2d 1145,

1154 (9th Cir. 1989). The City in this case has not "insinuated itself into a position of interdependence" with PRFA that the City must be recognized as a joint participant in prohibiting plaintiffs from wearing signboards in certain areas of the Festival Center. *See Gorenc*, 869 F.2d at 507. Similarly, the facts of this case are, insufficient to conclude under the public function test that PRFA performs functions that have been traditionally the exclusive prerogative of the state.

Plaintiffs have failed to show that PRFA is a state actor under section 1983, and therefore plaintiffs' section 1983 claim against-PRFA is denied.

This constitutes my Findings of Fact and Conclusions of Law as required by Federal Rule of Civil Procedure 52(a). Plaintiffs' motion for preliminary injunction (#11-1) is denied as moot, and plaintiffs' claims for permanent injunctive relief in their Complaint (#1-1) are dismissed in part and denied in part.

DATED this 31st day of May, 2000.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 9 2002
OFFICE OF THE CLERK

No. 01-1488

In The Supreme Court of the United States

OREGON ARENA CORPORATION
AND MICHAEL FENNELL,

Petitioners,

v.

DANIEL LEE, MICHAEL CARR, EDWARD
GATHRIGHT AND JEREMY SONNIER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners have misstated the question presented on this petition by attempting to characterize this case as a private party's regulation of speech on "its" [i.e., private] premises" (Petition, p. i) when it is undisputed this case involves an express delegation of speech regulation by the City of Portland in an admitted public forum situated on publicly-owned property.

Rather, the question presented on this petition is more accurately whether the Ninth Circuit properly decided petitioners were state actors when the undisputed facts show petitioners were promulgating and enforcing policies in a traditional public forum located on real property owned by the City of Portland under express delegated authority of the City to protect free expression in that forum.

LIST OF PARTIES

Respondents accept and agree with petitioners' statement of the parties.

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OPINIONS BELOW

Petitioners correctly recite the opinion of the Court of Appeals is reported at 276 F.3d 550 (9th Cir. 2002), and the decision of the district court is unreported.

JURISDICTION

Respondents accept petitioners' statement of jurisdiction based on 28 USC §1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

This matter arises under 42 USC § 1983 alleging violation of respondents' speech and religion rights in the Rose Quarter Commons, a traditional public forum situated on city-owned property, under the First and Fourteenth Amendments.

STATEMENT OF THE CASE

Except as otherwise noted herein, respondents accept petitioners' statement of the case, but draw the Court's attention to petitioners' misstatement of key material facts. Petitioners go to great lengths to differentiate what is publicly and privately owned around the subject forum, the Rose Quarter Commons (Petition, p. 2), but remain silent on what was undisputed below: the Ninth Circuit's finding, based on stipulated facts, "Portland owns the real property on which the Commons is located" (App. 3a). Petitioners also misquote the district court's findings of

undisputed fact. *Compare* "The City owns *portions of* the real property referred to as the Rose Quarter Commons" (Petition, p. 2) with "The City owns the real property referred to as the Rose Quarter Commons." (App. 18a) (emphasis added).

In the same manner, petitioners misstate the record in an apparent attempt to minimize the Court's appreciation of their continuous regulation of speech and conduct on the Commons, even when events are not in progress at nearby venues. They would have the Court believe petitioner's rules and code of conduct concerning speech apply only when "*the Rose Garden* – the sports arena – is open to the public (Petition, p. 3) when in fact "The Rules provide that free speech activity 'may occur only during the hours *the Rose Quarter Commons* is open to the public . . . '" App. 18a-19a (emphasis added).

Finally, petitioners subtly invite the Court to overlook a significant admission made on appeal: "The OAC has never challenged the plaintiffs' characterization of the Commons as a traditional public forum." *See* App. 3a. However, petitioners correctly acknowledge what was undisputed below: the City's original lease with petitioners required them "to permit access to and free speech on the Plaza as may be required by laws." App. 3a, 18a.

REASONS FOR DENYING PETITION

Petitioners invite this Court to accept review on the misleading premise this case:

> "potentially turns *any* private entity who regulates speech activities on *its* property into a governmental actor subject [sic] liability for civil

> rights violations. *Private* entities have long been able to regulate conduct on *private* property without being subject to claims of First Amendment violations. [Citations omitted]." Petition, pp. 4-5 (emphasis added).

Such a claim is overreaching, and the authorities on which it is based are totally irrelevant to the central question herein of petitioners' operation of a traditional public forum under an express governmental delegation of rulemaking and enforcement authority.

1. The decision of the Ninth Circuit was correct.

The Ninth Circuit correctly applied well-established authorities from this Court to undisputed facts in determining petitioners were state actors subject to liability under 42 USC § 1983 under this court's "public function" test. Petitioners claim "the regulation of speech activities has never been held an exclusive public function, and private action taken on public property has also never been held to be an exclusive public function as required by that test." Petition, p. 6. Petitioners are wrong on both counts.

Rather, the Ninth Circuit properly relied upon this Court's decision in *Marsh v. Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946) in determining the regulation of religious speech within a public forum to be a traditional and exclusive public function:

> In *Marsh v. Alabama* [citation omitted], the Court examined whether a company that regulated speech in a shopping district in its privately owned town became a state actor. The Court concluded that it did. The Court explained

> that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 503. Given that circumstance, the fact that the property is private is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties.' *Id.* at 509 . . . " [W]here facilities are built and operated primarily to benefit the public . . . their operation is essentially a public function . . . subject to state regulation." *Id.* at 506; see also *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanueil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D.Mass. 1990). App 8a.

If anything, the presence of public ownership of the underlying property herein strengthens the reasoning of this Court in *Marsh* and confirms its persuasiveness herein. Petitioners' effort to distinguish *Marsh* on its facts and its holding is unpersuasive because it is again misleading:

> This case presents a different fact scenario – the Rose Quarter Commons consists of privately owned *buildings* which are sometimes open to the general public and *some* City-owned property, all controlled by a private, for-profit company. Petition, p. 8 (emphasis added).

Similarly, the Ninth Circuit's reliance on *Evans v. Newton*, 382 U.S. 296, 15 L.Ed.2d 373, 86 S.Ct. 486 (1966) aptly demonstrates the fallacy of Petitioners' claim "private action taken on public property has also never been held to be an exclusive public function." Petition, p. 6. As this Court held in *Evans v. Newton:*

> The public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. *Id.* at 302.

The critical factor in *Marsh* and *Evans* is delegation of public authority to a private party to regulate a public forum, already determined by this Court to be an exercise of exclusive public function. The record herein further demonstrates the City of Portland required petitioners to engage in promulgating rules protecting speech for the forum (App. 3a, 18a), the exclusive province of the government. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). Moreover, delegated authority to exercise discretion in the enforcement of criminal statutes and private policies enacted at the behest of the city is properly an exclusive public function. *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanueil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D.Mass. 1990).

This case adds nothing to the jurisprudence in this area because it calls for a direct application of this Court's decisions in *Marsh* and *Evans*, correctly applied in *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanueil Hall Marketplace, Inc.*, *supra*, 745 F. Supp. 65. *See also Venetian Casino Resort LLC v. Local Joint Executive Board of Las Vegas, et al.*, 257 F.3d 937 (9th Cir. 2001) (formerly public sidewalk relocated onto private casino property under an agreement to maintain public access remained a public forum subject to the protections of the First Amendment, relying on *Fanueil Hall Marketplace).*

2. There is no split of authority between the circuits concerning application of the "public function" test for determining state action.

Petitioners attempt to create an illusory split of authority where none exists concerning application of the "public function" test for state action between the Ninth Circuit's decision in this case and decisions from the Seventh and Tenth Circuits, claiming this Court "has never considered [whether] the private exercise of traditional police functions [is a public function]." Petition, pp. 5, 9. In fact, those decisions are easily reconcilable based on what is "necessarily a fact-bound inquiry," *Brentwood Academy v. Tennessee Secondary Athletics Assn.*, 531 U.S. 288, 295, 148 L.Ed.2d 807, 121 S.Ct. 924 (2001), because most of those cases involve limited policing authority without reference to rulemaking in a traditional public forum.

Wade v. Byles, 83 F.3d 902 (7th Cir. 1996), involved a limited and nonexclusive grant of police authority to private security forces in the main lobby of a public housing project. *Id.* at 905-906. It is not instructive and does not conflict with the instant decision of the Ninth Circuit for the reason expressly articulated by the Ninth Circuit herein:

> The present case, unlike Wade, does not turn on whether the use of *limited* police powers on public land is a public function. It turns on what is quintessentially an exclusive and traditional public function – the regulation of free speech within a public forum. App. 11a (emphasis added).

Neither *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995) nor *Rendell-Baker v. Kohn*, 457

U.S. 830, 73 L.Ed.2d 418, 102 S.Ct. 2764 (1982) dictate a contrary result. *Gallagher* arose from pat-downs conducted by private security forces outside a concert arena on the campus at the University of Utah with no involvement of public officials or entities beyond receiving incidental proceeds of concert revenue and ownership of the concert venue. *Gallagher v. Neil Young Freedom Concert*, *supra*, 49 F.3d at 1455. The *Gallagher* court expressly distinguished the case factually from *Fanueil Hall Marketplace*. *Id.* at 1457. *Rendell-Baker* is inapposite because it involved a personnel decision at an institution receiving federal funds, with no indication any of those federal funds or any government mandate were directly related to the employment of the affected personnel. *Rendell-Baker v. Kohn*, *supra*, 457 U.S. at 840-842.

CONCLUSION

The petition should be denied because it misstates and misapplies the law and the undisputed facts in an effort to create an illusory circuit split when in fact this case fits squarely within existing, well-established constitutional jurisprudence of this Court. The presence of express government delegation of rulemaking for the protection of speech in what is admittedly a traditional public forum, together with the exercise of enforcement authority of those public and private rules, properly and fairly attributes the stamp of governmental authority and state action to petitioners' treatment of respondents.

DATED this 9 day of May, 2002.

Respectfully submitted,

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Of Counsel for Respondents